

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MARY LOU RAY**  
**(FORMERLY SHEPARD)**  
Claimant

VS.

**DILLONS, INC.**  
Respondent  
Self-Insured

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

Docket No. 1,000,170

**ORDER**

Respondent appealed the August 6, 2003 Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on January 27, 2004.

**APPEARANCES**

Chris Miller of Lawrence, Kansas, appeared for claimant. Scott J. Mann of Hutchinson, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The Board considered the record and adopts the stipulations listed in the Award.

**ISSUES**

Claimant was injured on April 20, 2001 when she fell at work. Respondent admits claimant met with personal injury by accident arising out of and in the course of her employment. However, respondent disagrees with the ALJ's finding that claimant has a 19 percent functional impairment to the body as a whole as a result of that accident. Rather, respondent contends that claimant suffered a temporary aggravation of her preexisting condition. Respondent further disputes that the claimant's hip replacement surgery was causally related to the accident at work.

Conversely, claimant argues that she is entitled to a 28 percent permanent partial disability award based upon a 15 percent functional impairment to her hip and a 15 percent impairment to her low back.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties arguments, the Board finds and concludes:

Claimant worked for respondent as the floral department manager at a Dillons store in Lawrence, Kansas. On or about April 19 or 20, 2001,<sup>1</sup> claimant "fell, pulled my leg on my right side and fell on my left knee."<sup>2</sup> Claimant testified that her symptoms were initially in her left knee and right hip. She said her low back symptoms did not start until after her hip replacement surgery. Claimant also acknowledged having "some back problems" before her April 20, 2001, accident.<sup>3</sup> She described treating with a chiropractor, Dr. Dray, for her low back and for headaches approximately one to two times a month for a period of two to four years before the accident. At the March 18, 2003 regular hearing claimant also said that she was no longer seeing Dr. Dray for her low back, only for headaches. Nevertheless, claimant asserted that her low back problems are worse now than what they were before the accident.

Dr. James Allen Dray is a chiropractic physician practicing in Lawrence, Kansas. He began treating claimant November 6, 1997 for headache, neck pain, chronic low back pain, left heel pain, right upper back pain, and right arm pain. Dr. Dray saw claimant eight (8) times during November and December of 1997, sixteen (16) times during 1998, twenty-six (26) times in 1999 and twelve (12) times in 2000. Not every office visit included low back complaints, but Dr. Dray described treating claimant off-and-on for chronic low back pain. On February 7, 2001, claimant complained of right leg numbness. She did not attribute her symptoms to any particular event. On her next visit, March 19, 2001, claimant reported "[t]hat she fell on March the 12<sup>th</sup> and damaged her left knee."<sup>4</sup> Claimant returned on March 21 and complained that her low back was tender. On March 28 she had

---

<sup>1</sup> The parties stipulated to the accident occurring on April 20, 2001. Nevertheless, at regular hearing claimant was asked whether she had an injury at work "on or about April 19th or 20th of 2001." (R.H. Trans. at 5).

<sup>2</sup> R.H. Trans. at 6.

<sup>3</sup> *Id.* at 13.

<sup>4</sup> Dray Depo. at 9.

complaints of right lower back and lumbosacral pain extending down the leg. Dr. Dray saw claimant again on April 13, 2001 for a continuation of the treatment of the time before, which he described as the low back and right knee. Dr. Dray next saw claimant on April 18, 2001. On that day she reported:

A. (Dr. Dray) Her right knee pain was increased but her lumbosacral and sacroiliac, let's see here, right knee pain was increased with lumbosacral and sacroiliac discomfort on the right. She can't walk without a limp. Her neck was feeling really good. She was not experiencing any left knee pain. Generally she was feeling much better and able to fully flex her back.

Q.(Mr. Mann) And we're speaking about the visit of April 18, 2001. Your notes reflect she could not walk without a limp. Is that correct?

A. Correct.

Q. If you know, what's that in reference to?

A. Her knee.

Q. Right knee?

A. Her right knee.

Q. Doctor, prior to April 18, 2001, and including that visit, would it be fair to state that you were seeing Miss Shepard on a regular basis for treatment of various complaints, to include low back complaints?

A. That's correct.<sup>5</sup>

The next time Dr. Dray examined claimant was April 20, 2001. Claimant reported:

A. (Dr. Dray) That she had fallen that day at approximately 7:45 A.M. at work. She hit her left knee, which was swollen. Now her neck was tightening up but there was no headache. There was contusion to the medial epicondyle and posterior calf of that knee. There appeared to be no indications of Murray's sign, which would indicate cartilaginous damage, or Drawer's sign, which would indicate collateral ligament, or pardon me, cruciate ligament damage.

---

<sup>5</sup> *Id.* at 11 and 12.

Q. (Mr. Mann) Would it be fair to state that her primary complaint to you on April 20<sup>th</sup> of 2001 was an injury to her left knee as a result of the fall that day?

A. That was what she indicated that day, yes. <sup>6</sup>

Dr. Dray continued to treat claimant thereafter. Claimant's symptoms progressed from being limited to only the left knee, to including the right leg, right hip and low back.

Q. (Mr. Mann) All right. You then saw her back five days later [April 25, 2001]. Is that correct?

A. (Dr. Dray) That's correct.

Q. And what was her complaint at that time?

A. That her left knee was swollen, that her low back felt fine at that time, and that she did not intend or want to pursue any kind of workmen's compensation for the knee injury.

Q. You saw her back next on 5-2 of 2001?

A. Correct.

Q. And what were her complaints at that time?

A. Right leg pain. She was limping with, in the right hip and was experiencing of cramping and muscle spasm in through her right hip-pelvic area.

Q. Did she relate those complaints to any particular event?

A. To no particular event, no.

Q. All right. Doctor, you continued to see her after May 2<sup>nd</sup>, 2001. Is that correct?

A. That's correct.

Q. And you continued to treat her for such things as chronic low back pain?

---

<sup>6</sup> *Id.* at 12 and 13.

A. We continued to treat her for the problems that we found, which low back pain certainly did develop and continue after that point, yes.<sup>7</sup>

Dr. Dray gave his deposition testimony on May 29, 2003. As of that date he had last seen claimant on March 13, 2003. Dr. Dray testified that after April of 2001 there was a change in focus with regard to his treatment of claimant. Thereafter, “even though she would still complain of her head and neck, the complaints centered around the pain in pelvis and the leg and the hip.”<sup>8</sup> However, after claimant’s hip replacement surgery of November 19, 2001, Dr. Dray had to alter his method of treating claimant so as not to disturb the prosthetic hip device. As a result, the chiropractic treatment did not provide claimant with as much relief with respect to her low back complaints as it had before her hip replacement surgery. Also, Dr. Dray noticed that her right thigh was longer than the left thigh. He placed a wedge beneath her left foot in order to level her pelvis and get her to bear weight equally on both hips. He estimated that claimant’s right leg was seven-eighths of an inch longer than her left leg. Dr. Dray had not noticed a great deal of pelvic imbalance before her surgery. He indicated that such a leg length differential could potentially have a drastic impact on an individual’s low back by throwing off muscle balance and weight-bearing.

Claimant’s second to the last visit with Dr. Dray was on July 22, 2002. On that date she had upper back tightness but no pain. Also, her right groin hurt but was “generally okay” she had no complaints of low back pain.<sup>9</sup> Claimant’s last visit was on March 13, 2003, her complaints were sinus headache, neck pain, right suboccipital pain, extending into the right shoulder, shoulder blade area. She made no complaints concerning her low back. In September 2002, Dr. Dray sent a letter to claimant’s attorney indicating that further attempts to adjust the low back area were probably not going to be successful and that he did not think that he was going to be able to provide her much, if any, additional relief to that area.

William W. Bohn, M.D., is a board certified orthopedic surgeon practicing with Johnson County Orthopedics in Olathe, Kansas. His practice is limited mainly to hip and knee replacement surgeries. He first saw claimant on September 6, 2001. At that time she gave a history “that she was in normal state of health without prior problems with the right hip when she fell over a short door at work at Dillons causing her to land on her left knee.”<sup>10</sup> . . . . “She stated that the right hip began hurting the day after the initial injury, and that the pain was in the groin in the right side radiating down to the knee, as well [as] to the

---

<sup>7</sup> *Id.* at 13 and 14.

<sup>8</sup> *Id.* at 17.

<sup>9</sup> *Id.* at 23.

<sup>10</sup> Bohn Depo. at 4.

back of the hip.”<sup>11</sup> X-rays showed severe degenerative joint disease of her right hip. Dr. Bohn said that her degenerative condition would have taken “a long period of time to occur” but, based on the history she provided, he believed the event on April 20, 2001 permanently aggravated that preexisting degenerative condition.<sup>12</sup> In rendering that opinion, however, Dr. Bohn said that it was important that claimant gave him a history of contemporaneous complaints of right hip pain following the fall. After being advised of the history contained in the chiropractic records of Dr. Dray, which showed that claimant did not report back or hip complaints on the date of accident nor at the examination five days later, and that the first record of claimant mentioning right leg and hip pain was on May 2, 2001, Dr. Bohn said “I still think it’s probable that it aggravated it either from the direct injury itself or just favoring the injured extremity, which was the opposite extremity.”<sup>13</sup>

Dr. Bohn considered claimant to have reached maximum medical improvement with respect to her right hip condition as of July 10, 2002. He released her from active medical care without permanent work limitations. Based upon the *Guides*<sup>14</sup> he rated her impairment at 15 percent. That rating assumed a good result from the total hip replacement. He was also asked to address the low back complaints. He considered claimant’s lumbar pain to be preexisting and unrelated to the work injury. Accordingly, he did not provide a separate impairment rating for the low back.

Although he had released her from active medical care, Dr. Bohn saw claimant again in October and December of 2002 and April of 2003. Dr. Bohn said that although claimant had a perception of limb length inequality, that was not a condition that he diagnosed nor was he able to objectively identify a true limb length inequality by measurements. At the time he last examined claimant she had a normal hip examination. Claimant also stated that she felt better with a half-inch build up in her shoe. Dr. Bohn noted that he had no record of low back complaints on October 30, 2002 to December 11, 2002 or April 30, 2003. Dr. Bohn was unable to provide a rating with respect to claimant’s hip and low back conditions as they existed before April 20, 2001. However, on cross examination he said he did not make any attempt to assess claimant’s permanent impairment to her low back because he understood from the patient that her back difficulties were the result of a preexisting condition. He did note on April 3, 2003, that claimant had a hip abductor lurch, which is a type of limp, and agreed that this sort of condition can have an effect upon an individual’s low back. Ultimately, Dr. Bohn was asked the following questions and gave the following answers with respect to claimant’s low back:

---

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.* at 7.

<sup>13</sup> *Id.* at 10 and 11.

<sup>14</sup> American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed.).

Q. (Mr. Mann) And counsel asked you a question, you didn't evaluate her back with respect to impairment. You did render an opinion - - well, let me ask it in this fashion.

Did you contemplate whether a rating should be provided for her low back with respect to the treatment and complaints which you received?

A. (Dr. Bohn) Right. Yes.

Q. And in your opinion, was providing a rating under the AMA Guides, Fourth Edition, appropriate for the low back in Miss Shepard's case?

A. No.

Q. And why not?

A. I didn't feel it was pertinent to the April, 2001 injury at Dillons.

Q. In arriving at that opinion, Doctor, did you take into consideration your treatment of Miss Shepard and the complaints she made each and every time you saw her following her surgery?

A. Yes.<sup>15</sup>

. . . .

Q. (Mr. Miller) Did you, in considering whether an assessment of permanent partial impairment to Miss Shepard's low back as a result of these injuries would be appropriate, did you consider whether her low back might have been, her low back condition might have been aggravated or accelerated or intensified as a result of these injuries, or as a natural and probable consequence of these injuries?

A. (Dr. Bohn) Yes. And I actually - - I felt that, if anything, the better or improved functional artificial hip would actually improve the chance of her having a more normal back condition rather than the reverse, aggravating, you know, the results of the treatments that we did, and that sort of thing. So I felt it would actually, if anything, ameliorate the spinal condition rather than worsen it.<sup>16</sup>

---

<sup>15</sup> Bohn Depo. at 28 and 29.

<sup>16</sup> *Id.* at 29.

. . . .

Q. (Mr. Miller) And your assessment that she had no permanent impairment to her lower back was based on your understanding that she was not receiving treatment from [sic] her lower back between April of 2001 and May of 2002, is that accurate?

A. (Dr. Bohn) I would say that I was mainly basing my opinion that she did not have permanent impairment based on her initial presenting history to me, and the same type of history was presented to me in subsequent visits, so that if she had a significant lumbar injury at Dillons, I was not made aware of it.

And, you know, I don't know that I can change my opinion about that based on, you know, her going to a chiropractor that she's been going to since 1997 or 1998, that, you know, for lumbar adjustments, or whatever, for her lumbar spine. It makes it difficult to attribute impairment, or, you know, injury to that April of 2001 incident.<sup>17</sup>

. . . .

Q. (Mr. Miller) What sort of information would you need to know in order to make that determination?

A. (Dr. Bohn) Well, I don't think I, based on the information I have about her use of chiropractic, you know, prior to her injury, I don't think that I, and based upon her mechanism of injury, I don't think I would change my opinion even if somebody showed me degenerative disc disease on MRIs, or things like that.

I have seen too many patients, and, you know, I'm in the hip business, I see lots and lots of degenerative disc disease patients also, because we're trying to sort out what's what and what's causing the pain, and she just, she just smacks of being more of a hip patient than a lumbar patient to me, and I would be surprised if she's fooled me over a two year period of time with that.<sup>18</sup>

---

<sup>17</sup> *Id.* at 33 and 34.

<sup>18</sup> *Id.* at 34 and 35.



Claimant was examined by board certified orthopedic surgeon Edward J. Prostic, M.D., on April 1, 2002, at the request of her attorney. He determined that claimant injured her low back and right hip as a result of a fall at work on April 20, 2001.

It is my opinion that she aggravated osteoarthritis of the hip for which she required total hip replacement arthroplasty and aggravated degenerative disc disease in her back where she has pseudo-spondylolisthesis at L4-5 and end stage disc disease at L5-S1.<sup>19</sup>

Dr. Prostic said the rating for a total hip replacement arthroplasty with a good result is 15 percent to the body as a whole on a functional basis. In his opinion claimant also has a 15 percent permanent partial impairment to her low back based upon severe degenerative disc disease and restriction of motion. He combined these ratings to a 28 percent permanent partial impairment to the body as a whole on a functional basis. Dr. Prostic said his rating was based on the *Guides* 4<sup>th</sup> edition using the range of motion model rather than the DRE method of providing a rating.

Dr. Prostic acknowledged that he did not adhere to the methodology for determining range of motion that is required by the *Guides*. Dr. Prostic justified this failure based upon his opinion that the use of two point inclinometers is “a waste of time” because “the relationship between lumbar range of motion measure and functional ability is weak or non-existent.”<sup>20</sup> This statement appears to undermine rather than support, Dr. Prostic’s advocacy of the range of motion method over the DRE method for this patient. Dr. Prostic further acknowledged that he failed to use a two point goniometer as required by the *Guides* because “[i]t’s not really scientific and it’s not useful.”<sup>21</sup>

Dr. Prostic examined claimant on just the one occasion, April 1, 2002. Although he was aware that she had undergone total hip replacement surgery on November 19, 2001, he was not aware that the treating physician, Dr. Bohn, had not yet released claimant as having reached maximum medical improvement on the day of Dr. Prostic’s examination. Dr. Prostic acknowledged that claimant’s degenerative disc disease and pseudo-spondylolisthesis at L4-5 preexisted the April 20, 2001 accident but, based upon the history claimant gave of a severe acceleration of her low back symptoms by the accident, Dr. Prostic opined that her preexisting low back conditions were aggravated by the fall at work. Dr. Prostic was not aware that claimant had previously been provided a functional impairment rating for an accident that occurred approximately ten years earlier. He was also unaware of claimant’s history of chronic low back pain and chiropractic treatment for

---

<sup>19</sup> Prostic Depo. at 7.

<sup>20</sup> *Id.* at 18.

<sup>21</sup> *Id.* at 21.

“two to four years preceding this date of accident.”<sup>22</sup> It was Dr. Prostic’s understanding that her prior chiropractic treatment was for neck and shoulder pain.

Dr. Prostic agreed that “[i]t would certainly be useful” to have known that claimant had been assigned a functional impairment rating ten years before his exam.<sup>23</sup> The record does not reflect what that rating was nor was Dr. Prostic asked to give an opinion concerning the percentage of claimant’s preexisting impairment under the 4<sup>th</sup> edition of the *Guides*.

The ALJ requested an independent medical examination (IME) by Peter Bieri, M.D., who is board certified by the American Academy of Disability of Evaluating Physicians. Dr. Bieri examined claimant on February 5, 2003. Dr. Bieri rated claimant’s functional impairment pursuant to the *Guides* 4<sup>th</sup> edition as 15 percent to the whole person for the residuals of hip replacement and five percent whole person for the lumbar strain which he placed in DRE Lumbosacral Category II. These combine for a 19 percent whole person impairment. Although Dr. Bieri attributed claimant’s right hip and low back impairments to the April 20, 2001 accident in his report and initially during his deposition testimony, after being presented with the history of symptoms and complaints contained in Dr. Dray’s records, Dr. Bieri’s causation opinion changed.

Q. (Mr. Mann) And so that I understand your answer, assuming that the history I gave you is accurate, that there were no complaints of injury to the right hip and there was no treatment of the right hip on April 20<sup>th</sup> and on April 25<sup>th</sup>, when Dr. Dray saw her, can you state within reasonable medical probability that she injured her right hip in that, in the April 20<sup>th</sup>, 2001, work-related fall?

. . . .

A. (Dr. Bieri) Not based on Dr. Dray’s records, which I don’t have.

Q. And same question for the low back, Doctor. Assuming the hypothetical question that I have given you is accurate, can you state within reasonable medical probability that Miss Shepard injured her low back as the result of an April 20<sup>th</sup>, 2001, fall?

. . . .

---

<sup>22</sup> *Id.* at 15.

<sup>23</sup> *Id.* at 21.

Q. Can you state within medical probability, based on the hypothetical history that I gave you from Dr. Dray, that Miss Shepard injured or aggravated her back in the fall of April 20<sup>th</sup>, 2001?

A. Based on the hypothetical I'm going to say no.<sup>24</sup>

Dr. Bieri also testified that he understood claimant's preexisting impairment, that is before the April 20, 2001 accident, had been rated as ten percent, based on a earlier edition of the *Guides*. He further stated that her preexisting impairment would be at least five percent under the 4<sup>th</sup> edition. Although Dr. Bieri testified that claimant sustained an additional five percent impairment rating as a result of the April 20, 2001 accident, this opinion appears nonsensical given that he based the five percent on DRE Category II. If claimant has a five percent total impairment based on DRE Category II after April 20, 2001, but also had at least five percent preexisting, then her present five percent cannot be described as "additional." Similarly, his opinion attributing an additional five percent to the April 20, 2001 accident contradicts his answer on page 15 of his deposition transcript where he states that based upon the history from Dr. Dray's records he cannot attribute a back injury or aggravation to the April 20, 2001 accident. It appears that Dr. Bieri may have been under the impression in conducting his IME examination that because he was to assume that claimant did, in fact, suffer injury by accident on April 20, 2001, somehow this meant he was likewise to attribute all her current injuries and complaints to that accident. Any misconceptions he may have had notwithstanding, Dr. Bieri goes back-and-forth on the issue of preexisting impairment but his final opinion appears to be that claimant had a five percent lumbosacral impairment before April 20, 2001 and a five percent impairment after April 20, 2001 under DRE Lumbosacral Category II.

Q. (Mr. Mann) And my only question is, Doctor, according to my hypothetical she does meet the criteria for a five percent rating under the AMA Guides, Fourth Edition, prior to April 20<sup>th</sup>, 2001?

A. (Dr. Bieri) Yes, sir.<sup>25</sup>

The Board finds the testimony of Dr. Bohn, the treating physician, to be the most credible with regard to both causation and impairment. The ALJ's finding of five percent impairment for the back injury, which the ALJ awarded based upon the opinion of Dr. Bieri, should be reversed because neither Dr. Bohn nor Dr. Bieri could relate that impairment to claimant's April 20, 2001 accident at work. However Dr. Bohn, unlike Dr. Bieri, did relate the hip injury and surgery to the April 20, 2001 accident. Therefore, the ALJ's finding of a 15 percent whole body impairment for the hip injury should be affirmed, but the Board bases this finding upon the opinion of Dr. Bohn, not Dr. Bieri.

---

<sup>24</sup> Bieri Depo. at 13-15 (objections omitted).

<sup>25</sup> *Id.* at 26.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery is modified as follows:

The claimant is entitled to 21.05 weeks of temporary total disability compensation at the rate of \$390.18 per week or \$8,213.29 followed by 61.34 weeks of permanent partial disability compensation at the rate of \$390.18 per week or \$23,933.64 for a 15 percent permanent partial disability, making a total award of \$32,146.93, which is all due and owing, and ordered paid in one lump sum less amounts previously paid.

All authorized and ordered medical treatment is ordered paid subject to the fee schedule.<sup>26</sup>

The Board adopts the other orders of the ALJ not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February 2004.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Chris Miller, Attorney for Claimant  
Scott J. Mann, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Anne Haught, Acting Workers Compensation Director

---

<sup>26</sup> See K.S.A. 44-510i.